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Nos. 09-1454 and 09-1478

In the Supreme Court of the United States

BOB CAMRETA, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER BOB CAMRETA

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QUESTIONS PRESENTED

(1) The State received a report that a nine-year-old child was being abused by her father at home. A child-protection caseworker and law-enforcement officer went to the child's school to interview her. To assess the constitutionality of that interview, the Ninth Circuit applied the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals. Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that this Court has identified as the appropriate standard when a witness is temporarily detained?

(2) The Ninth Circuit addressed the constitutionality of the interview in order to provide "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment [,]" and it thus articulated a rule that will apply to all future child-abuse investigations. Is the Ninth Circuit's constitutional ruling reviewable, notwithstanding that it ruled in petitioner's favor on qualified immunity grounds?

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The decision of the United States Court of Appeals for the Ninth Circuit—reported at *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009)—appears in the appendix to the petition for a writ of certiorari. Pet. App. 1. The unreported district court's opinion also appears in that appendix. Pet. App. 55.

JURISDICTION

The Ninth Circuit filed its opinion on December 10, 2009. The Ninth Circuit denied rehearing by order dated March 1, 2010. The State timely filed its petition for a writ of certiorari on May 27, 2010. This Court granted the petition on October 12, 2010. The same day, this Court granted the petition for writ of certiorari in *Alford v. Greene*, 09-1478, and consolidated the two cases. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2006). On November 17, 2010, this Court granted Camreta's request for a two-week extension of time in which to file the opening brief on the merits.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Section 1983 provides, in pertinent part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983 (2006).

STATEMENT OF THE CASE

A. After receiving information that the child's parent may have been sexually abusing her, an officer and a child-protective caseworker went to the child's public school to interview her.

For purposes of this Court's review, petitioner recites the following facts, as recounted by the Ninth Circuit.[1] Police arrested Nimrod Greene (Nimrod) on February 12, 2003, for sexually abusing F.S., a seven-year-old boy. *Greene*, 588 F.3d at 1016. F.S. reported to his parents that Nimrod had touched F.S.'s penis

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[1] Because Greene appealed a grant of summary judgment in favor of Camreta, the court drew all reasonable inferences in Greene's favor. *Greene*, 588 F.3d at 1021.

over his jeans when Nimrod was intoxicated, and that Nimrod had done that once before as well. *Id.* F.S.'s mother told police officers that Nimrod's wife, Sarah, had talked about how she did not like the fact that Nimrod made their daughters, nine-year old S.G. and five-year old K.G., sleep with him in his bed when he was intoxicated. *Id.* F.S.'s father told officers that Nimrod himself had commented that his wife Sarah had accused him of sexually abusing his daughters and that she did not like S.G. and K.G. lying in bed with Nimrod when he had been drinking. *Id.*

The Oregon Department of Human Services (DHS) learned of those allegations about a week after police arrested Nimrod. *Id.* The following day, Bob Camreta, a caseworker for DHS, learned that Nimrod had been released from jail and was having unsupervised contact with K.G. and S.G. *Id.* DHS assigned Camreta to assess the children's safety. *Id.*; *see* Or. Rev. Stat. § 419B.020(1)(a) (2009) (requiring DHS to investigate allegations of child abuse "immediately"). Based on his training and experience, Camreta was "'aware that child sex offenders often act on impulse and often direct those impulses against their own children, among others. For this reason, [he was] concerned about the safety and well-being of Nimrod Greene's own small children.'" *Greene*, 588 F.3d at 1016 (brackets in original).

The following Monday, Camreta and Deputy Sheriff Alford went to S.G.'s public school to interview her. *Greene*, 588 F.3d at 1016; J.A. 70. Camreta chose to interview her at her school because schools are "a place where children feel safe" and because doing so

would allow him "'to conduct the interview away from the potential influence of suspects, including parents.'" *Greene*, 588 F.3d at 1016; *see also* Or. Rev. Stat. § 419B.045 (2009) (allowing for child abuse investigations to take place on public school premises). According to Camreta, "'[i]nterviews of this nature, on school premises, are a regular part of [child-protective services] practice and are consistent with DHS rules and training.'" *Greene*, 588 F.3d at 1016 (brackets in original). DHS did not inform S.G.'s mother, Sarah, about the interview. *Id.* at 1016-17. Neither Camreta nor Alford obtained a warrant or other court order before the interview. *Id.* at 1017.

When Camreta and Alford arrived at S.G.'s school, Camreta told school officials that he and Alford wanted to interview S.G. and he requested use of a private office. *Id.* Terry Friesen, a school counselor, went to S.G.'s classroom and told her that someone was there to talk with her. *Id.* Friesen took S.G. to the room where Camreta and Alford were waiting, and then left. *Id.* According to S.G., Camreta interviewed S.G. for two hours in Alford's presence, although Alford did not ask any questions during the interview. *Id.* Alford was in uniform and had a visible firearm. *Id.* The interview was not recorded. *Id.*

According to Camreta, during the interview S.G. disclosed several incidents of sexual abuse by Nimrod. In contrast, S.G. later recounted that she felt pressured by Camreta and "'just started saying yes to whatever he said.'" *Id.*

The State indicted Nimrod on six counts of felony sexual assault involving S.G. and F.S. *Id.* at 1018. A

jury could not reach a verdict on the charges. *Id.* at 1020. Facing a retrial, Nimrod accepted an *Alford* plea with respect to the charges involving F.S. *Id.* In exchange, the State dismissed the charges related to S.G. *Id.*

B. S.G.'s mother filed a § 1983 action, and the district court granted summary judgment in favor of Camreta.

On behalf of herself and her minor children (S.G. and K.G.), respondent Sarah Greene sued Camreta under 42 U.S.C. § 1983 (2006) for alleged violations of the Fourth and Fourteenth Amendments.[2] *Greene*,

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[2] Greene, on behalf of S.G., alleged Fourth Amendment claims against Bend LaPine School District and Deschutes County based on allegations of an official policy or long standing custom of allowing State officials to seize children such as S.G. Greene also brought a claim on behalf of S.G. against the school guidance counselor for her role in removing S.G. from class for the interview. The district court rejected those claims, and Greene did not challenge that holding before the Ninth Circuit. *Greene*, 588 F.3d at 1020 n.4. Rather, Greene focused on S.G.'s claims against Camreta and Alford, arguing that both had violated S.G.'s Fourth Amendment right to be free from unreasonable seizures. Greene also argued that, when Camreta removed the children from her home and excluded her from S.G.'s physical examination, he violated both her children's and her due process rights under the Fourteenth Amendment.

On appeal, the Ninth Circuit reversed on Greene's two Fourteenth Amendment due process claims, holding that Camreta was not entitled to immunity and that there were genuine issues of material fact precluding summary judg-

588 F.3d at 1020. Greene alleged that Camreta violated S.G.'s Fourth Amendment right to be free from unreasonable seizures when he had S.G. removed from her classroom, taken to another room, and subjected to an interview about possible sexual abuse by her father. *Id.*

The district court granted summary judgment in favor of Camreta. *Id.* The court ruled that S.G. had been seized for purposes of the Fourth Amendment, but that no constitutional violation occurred. *Id.* The court looked to this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and to the Tenth Circuit's application of those cases in *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994). Pet. App. 62-63. In *Bagan*, the Tenth Circuit considered whether the in-school seizure of a nine-year-old boy by a social-services caseworker to interview him about his possible sexual abuse of another child violated the Fourth Amendment. *Bagan*, 41 F.3d at 573-74. Applying the balancing test from *Terry*, as incorporated in *T.L.O.*, the court in *Bagan* held that no constitutional violation occurred. *Id.* at 574 n.3. It reasoned that the seizure "was justified at its inception because a victim of child abuse had identified [the boy] as her abuser[, and] a ten minute interview with a social services caseworker was reasonably related in scope to determining [the boy]'s role in the incident." *Id.*

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ment. *Id.* Camreta has not sought review of that ruling, and those claims have been remanded to the district court.

Viewing the facts in the light most favorable to Greene, the district court concluded first that S.G. had been seized. Pet. App. 62. Then, under the *Terry/T.L.O.* analysis, the court concluded that the seizure of S.G. was reasonable at its inception (supported by a reasonable suspicion that S.G. had been sexually abused by her father) and was reasonable in scope (the interview's length was justified under the circumstances). Pet. App. 63-64. The court ruled alternatively that, even if the seizure were unconstitutional, qualified immunity protected Camreta from liability. Pet. App. 64-65.

C. The Ninth Circuit concluded that Camreta violated the Fourth Amendment when—without a warrant, court order, exigent circumstances, or parental consent—he interviewed S.G. at her school about suspected sexual abuse by her father.

On appeal, the Ninth Circuit concluded that its decision in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), went "a fair way" towards resolving the issue presented. *Greene*, 588 F.3d at 1022. That case involved a social worker and a police officer visiting the family home, entering without consent, and interviewing and examining the children. The Ninth Circuit held that traditional Fourth Amendment protections—that is, the "'general law of search warrants'"—applied to child-abuse investigations. *Greene*, 588 F.3d at 1030 (quoting *Calabretta*, 189 F.3d at 814). The Ninth Circuit also concluded that the seizure could not be justified under the "special-needs doctrine," because the government had failed to iden-

tify a need, beyond the normal need for law enforcement, to justify a seizure in the absence of a warrant. *Greene*, 588 F.3d at 1030.

At the same time, the Ninth Circuit agreed with the district court's ruling that because the constitutional right at issue was not clearly established, Camreta was protected by qualified immunity. *Id.* at 1033. To determine whether the constitutional right was clearly established, the Ninth Circuit considered the "'objective legal reasonableness of the action'" and whether Camreta "'could . . . have reasonably but mistakenly believed that his . . . conduct did not violate a clearly established constitutional right[.]'" *Id.* at 1031 (quoting *Pearson v. Callahan*, __U.S.__, 129 S. Ct. 808, 822 (2009), and *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001)). Applying that standard, the court first concluded that Camreta "could have reasonably believed that the decision to seize S.G. was sufficiently justified at its inception." *Greene*, 588 F.3d at 1031. Next, the court concluded that Camreta reasonably could have concluded that the seizure also was justified in its scope: although Camreta interviewed the victim for two hours in a "closed" room with a law-enforcement officer present, that length of interview was necessary because S.G. became more responsive and began disclosing the sexual abuse as the interview progressed. *Id.* at 1031-33. The Ninth Circuit nevertheless made explicit that "government officials investigating allegations of child abuse should cease operating on the assumption that a 'special need' automatically justifies dispensing with traditional Fourth Amendment protections in this context." *Id.* at 1033.

Camreta petitioned the Ninth Circuit for rehearing. Pet. App. 78. Camreta argued that the Ninth Circuit should apply the standard this court articulated in *Illinois v. Lidster*, 540 U.S. 419 (2004). Pet. App. 89-91. The Ninth Circuit denied the petition for rehearing. Pet. App. 76-77.

Camreta then petitioned for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

A child protection caseworker and a law-enforcement officer received information that made them suspect that a child was being sexually abused by her father at home. They went to the child's public school—a safe location away from the offending parent—and interviewed her about the allegations. The Ninth Circuit concluded that that seizure was unconstitutional under the Fourth Amendment at its inception because it was unsupported by either a warrant based on probable cause or an exception to the warrant requirement.

In so holding, the Ninth Circuit ignored the most fundamental of Fourth Amendment principles: every seizure must be "reasonable." And reasonableness, in turn, is not determined by rigid adherence to the warrant requirement. That holds particularly true when the seizure at issue is less intrusive than that involved in a traditional arrest. Beginning with *Terry v. Ohio*, this Court has repeatedly recognized that the reasonableness of a seizure is determined by balancing the government's interests in the seizure against the individual's privacy expectations. That reason-

ableness inquiry is a dual one that considers both whether the seizure was justified at its inception and whether the seizure was reasonably related in scope to the circumstances justifying the seizure in the first place.

In *Terry*, that balancing inquiry led to the now familiar reasonable suspicion standard for a stop and frisk. But in *Illinois v. Lidster*, this Court recognized that the Fourth Amendment does not require every seizure to be supported by a particular level of suspicion. Instead, when the seizure at issue is one that is effected not to investigate an individual for criminal wrongdoing but rather to determine whether that individual was a witness to a crime, courts simply balance the government's interests against the individual's privacy rights and the degree to which the seizure advanced the government's interests, to determine whether the seizure is reasonable at its inception and in its scope.

That balancing test also provides the proper analytic framework when there was no clear practice either approving or disapproving the type of seizure at issue at the time that the Framers created the Fourth Amendment. Here, no clear practice of compulsory education or organized government child protection existed at the time of the Fourth Amendment's framing. Strict adherence to the warrant requirement is therefore inappropriate.

In light of those fundamental Fourth Amendment principles, the seizure at issue here was reasonable. Balancing the government's interests against the child's privacy expectations, the seizure was justified

at its inception. The government's interest in protecting children from abuse is substantial. Child abuse is an epidemic of national proportions, and protecting children from that abuse is one of society's fundamental goals. The government has a compelling interest in conducting child-abuse investigations in a manner that is least likely to be traumatic for the child and is least likely to taint disclosures of abuse. To accomplish these goals, law-enforcement officers and child-protective caseworkers frequently will conduct joint investigations to minimize the number of times the child has to be interviewed. Balanced against those substantial government interests is the reduced privacy expectation that children have at schools. As this Court has recognized, during the course of the school day schoolchildren are subject to the control of the state. That control is enduring while the child is at school, even as to non-school government officials. Moreover, statutes and rules require school teachers to report instances of suspected abuse and, in some cases, mandate that the investigations take place at schools, further demonstrating that the expectation of privacy of children in school is less than that of adults. The alternatives to an in-school interview are fraught with potential peril for child victims or are impractical. Seeking parental consent is simply not a safe or viable option when the suspected abuser is a parent. Obtaining a warrant based on speculation and hearsay—without interviewing the child—may be impossible or inadvisable because development of probable cause often depends upon the victim who may be the sole witness to the suspected crime.

The Ninth Circuit's refusal to apply the balancing test was based in its belief that the government was unable to satisfy the "special-needs doctrine" that would allow the government to conduct a seizure based on a particular governmental interest "beyond the normal need for law enforcement." But the special-needs doctrine and its focus on the level of law-enforcement involvement does not apply when the potential for self-incrimination is minimal or absent. Here, where the seizure occurred to determine whether the child was a victim of a crime, the presence of law enforcement and whether law enforcement gathered evidence with respect to someone other than that child does not render the seizure unconstitutional.

Thus, because the government interests in investigating allegations of suspected child abuse are so substantial and compelling, a seizure of a child in a school to investigate allegations of child abuse satisfies the Fourth Amendment mandate that searches and seizures be reasonable. That is precisely what occurred here: acting on a report that the child's father might be sexually abusing her, a law-enforcement officer and caseworker went to the child's school to interview her about the allegations. The seizure was thus justified, and reasonable, at its inception.

Finally, the fact that the Ninth Circuit ultimately concluded that Camreta is entitled to qualified immunity does not preclude review of the question whether the Ninth Circuit applied the proper constitutional standard to determine whether the seizure was constitutional. The Ninth Circuit's decision now

stands as precedent that governs how government officials must conduct child-abuse investigations in the nation's largest circuit. Absent the ability to seek further review in this case, the government either must comply with what it believes to be an erroneous decision or continue interviewing potential child-abuse victims without first obtaining warrants and incurring significant liability in the process. The court's decision in this case is not mere "dicta" that would otherwise preclude this Court's review.

ARGUMENT

The Ninth Circuit held that a temporary detention of a potential child-abuse victim at her school for an interview about the suspected abuse is reasonable—and therefore constitutional—only when supported by a warrant based on probable cause.[3] The Ninth Circuit thus applied the same Fourth Amendment standard that applies to the arrest of criminal suspects. But the determination of what is "reasonable" under the Fourth Amendment depends on the context of the seizure. When the context of a seizure is less intrusive than that involved in a traditional arrest, involves a potential witness or victim of a crime, and when historically no practice existed disapproving such a seizure, a warrant based on probable cause is not required to make the seizure "reasonable." Rather, and as relevant here, government officials may—without a warrant, an exception to the warrant requirement, or parental consent—detain and inter-

[3] All references to the warrant requirement include any exceptions to the warrant requirement.

view a potential child-abuse victim at her school to determine whether additional, protective actions are necessary. A seizure in that context satisfies the Fourth Amendment requirement that all seizures be "reasonable."

A. The Fourth Amendment requires that a seizure be "reasonable." In the context of a seizure of a potential victim of child abuse, that determination requires balancing the government's interests and the individual's privacy expectations.

The Ninth Circuit determined that nothing short of a warrant based on probable cause would render an interview of a potential child-abuse victim at the child's school reasonable, and thus constitutional. But the Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause[.]" The Fourth Amendment does not, as the Ninth Circuit concluded, categorically require a warrant based on probable cause for every seizure; it requires only that that seizure be "reasonable." To be sure, the abstract notion of "reasonableness" "is a difficult task which has for many years divided the members of this Court." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). This Court has examined and applied that standard in a number of different contexts. For instance, this Court has considered the reasonableness of seizures of individuals suspected of wrongdoing, yet the seizures have been less intrusive than traditional arrests. *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

Other cases have involved suspicionless seizures or searches of individuals as part of a broader, systematic program not targeted at any particular individual. *E.g.*, *Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444 (1990). And still others have involved the seizure of potential witnesses to a recent crime. *E.g.*, *Lidster*, 540 U.S. 419.

While the factual underpinnings of the seizures in those cases have varied, a unifying governing principle can be extracted from each: rather than requiring rigid adherence to the warrant requirement, every seizure—particularly a seizure that is less intrusive than a traditional arrest or one that is undertaken not to investigate an individual for having committed a crime—must be assessed under the Fourth Amendment's mandate that a search or seizure be reasonable. That determination in turn is judged by balancing a seizure's intrusion on the individual's privacy rights against its promotion of legitimate governmental interests. And in some cases, the government interests are so substantial and compelling that, when compared to an individual's privacy interest, a warrantless seizure may nevertheless satisfy the Fourth Amendment mandate that searches and seizures be reasonable. This is such a case: rather than applying the traditional warrant requirement that applies to arrests of criminal suspects, as the Ninth Circuit did, this Court should assess the reasonableness of the seizure of a potential victim of child abuse by balancing the competing interests involved.

1. The Fourth Amendment guarantees the right to be secure from "unreasonable" seizures; it does not categorically require a warrant based on probable cause.

While probable cause and warrant requirements have long been considered important components of Fourth Amendment seizures, they have never been viewed as a necessary substitute for the Fourth Amendment's mandate of reasonableness. Traditionally, the "'long-prevailing standards' of probable cause embodied 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" *Dunaway v. New York*, 442 U.S. 200, 208 (1979), (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)) (alterations in original in *Dunaway*). "The term 'arrest' was synonymous with those seizures governed by the Fourth Amendment." *Id.* Therefore, under the "traditional" or "general" approach, the probable cause and warrant requirements applied to all Fourth Amendment seizures—or arrests—of persons "without the need to 'balance' the interests and circumstances involved in particular situations." *Id.*

But the Fourth Amendment does not impose an "irreducible requirement" of probable cause and a warrant based upon individualized suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *see also Terry*, 392 U.S. at 27 (allowing for a stop and frisk based on reasonable suspicion). Rather, the ul-

timate touchstone of the Fourth Amendment is "reasonableness." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619 (1989) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). To determine the reasonableness of a search or seizure in the absence of a warrant, "it is necessary to balance the individual's privacy expectations against the government's interests to determine whether," in the particular context, requiring a warrant or some level of individualized suspicion is "impractical." *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989); *see id.* at 665-66 ("the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions"); *see also Skinner*, 489 U.S. at 616-18 (holding a drug urinalysis to be a search); *Camara*, 387 U.S. at 536-37 (there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.").

That reasonableness balancing test applies, for instance, to seizures of suspected criminals that are less intrusive than those in traditional arrests. *Terry*, 392 U.S. at 20. In *Terry*, because the intrusion involved in a "stop and frisk" was less intrusive than that involved in an arrest, "the Court declined to stretch the concept of 'arrest'—and the general rule requiring probable cause to make arrests 'reasonable' under the Fourth Amendment—to cover such intrusions."

Dunaway, 442 U.S. at 209 (explaining *Terry*). "And to determine the justification necessary to make this specially limited intrusion 'reasonable' under the Fourth Amendment, the Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety." *Id.* (citing *Terry*, 392 U.S. at 22-27). The result of that balancing approach, of course, was the now-familiar "reasonable suspicion" standard for a "stop and frisk". *Terry*, 392 U.S. at 27.

Terry thus departed from traditional Fourth Amendment analysis by "defin[ing] a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway*, 442 U.S. at 210. To apply that test, courts balance "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 51 (1979). And because the Fourth Amendment "proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation[,]" that balancing is part of a dual reasonableness inquiry that takes into consideration "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20, 28.

This Court concluded in *Terry* that some level of individualized suspicion—*i.e.*, reasonable suspicion—was required to render the "stop and frisk" "reasonable." *Terry*, 392 U.S. at 27. But, at least broadly speaking, the Fourth Amendment does not mandate individualized suspicion in cases in which the seizure is not to investigate an individual of having committed a crime, but rather is a part of "routine administrative functions." *Von Raab*, 489 U.S. at 668. In such cases, requiring a showing of probable cause is "unhelpful": when the government seeks to prevent the development of hazardous conditions or detect violations, the government's efforts to do so will "rarely generate articulable grounds for searching any particular place or person." *Id.* at 668-72 (applying balancing test and concluding that no warrant is required before conducting mandatory drug testing of Customs Service officers involved in drug interdiction or who carry firearms); *see also Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444, 451-55 (1990) (applying balancing test and concluding government's need to eradicate drunk driving on the nation's freeways was so substantial that law enforcement did not need warrants before conducting checkpoint seizure, so long as the checkpoint advanced the public interest).

Until *Illinois v. Lidster*, the cases in which the Fourth Amendment's general balancing test had been applied primarily involved either (1) seizures of individuals suspected of wrongdoing but whose seizures were less intrusive than traditional arrests and (2) seizures that were effected as part of a systematic program, such as routine drug tests. But in *Lidster*, this Court considered the constitutionality of detain-

ing potential witnesses to a crime. At issue was whether the brief, suspicionless detention of motorists at a police checkpoint to determine if they had witnessed a recent hit-and-run accident in the area amounted to an unreasonable seizure under the Fourth Amendment. *Lidster*, 540 U.S. at 422. This Court first recognized that the stop's "primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime," but rather to solicit assistance in gathering information about a crime that someone else committed. *Id.* at 423 (emphasis in original). And when officers seize a potential witness, "by definition, the concept of individualized suspicion has little role to play." *Id.* at 424.

This Court thus concluded that the Fourth Amendment does not demand a warrant or probable cause as a necessary predicate to the seizure of potential witnesses. Instead, to determine whether the warrantless seizure of the motorists was reasonable, the Fourth Amendment requires a balance of the government's interests served by the seizure, the individual liberty interests at stake, and "'the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'" *Id.* at 427 (quoting *Brown*, 443 U.S. at 51). That balancing assumes that "a warrant is not required to establish the reasonableness of *all* government [seizures]; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required[.]" *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (emphasis in original). This Court then concluded that the seizure of the individual to determine

whether he was a witness to a crime was both reasonable at its inception and in its scope, because the stop was tailored to the need, was minimally intrusive given the government interest, and the stops were uniformly administered. *Lidster*, 540 U.S. at 426-28.

The foregoing fundamental Fourth Amendment principles—as articulated in *Terry*, *Von Raab*, and *Lidster*—demonstrate that this Court must assess the reasonableness of the seizure at issue in this case by balancing the various interests at play. The seizure here—an interview of a child at her school to determine whether she was the victim of sexual abuse by her father—is not an arrest of an individual suspected of having committed a crime. Accordingly, mechanically applying the standard that applies to arrests of criminal suspects, as the Ninth Circuit did, fails to take into account this Court's repeated admonitions that the ultimate inquiry in evaluating the constitutionality of *any* seizure is whether it is reasonable. That question is one that can be answered only by balancing the government's interests against the individual's privacy interests. In some cases—particularly, as explained in more detail below, in those cases involving seizures not contemplated by the Framers—the government's interest in the seizure may be so substantial as to outweigh the individual's limited privacy rights. And when that seizure is proportional in scope to the reasons for the seizure, it satisfies the Fourth Amendment's mandate that every seizure be reasonable.

2. Where, as here, the type of seizure was neither approved nor disapproved at the time of the Fourth Amendment's enactment, the *Terry/Lidster* balancing of governmental and individual interests applies.

The balancing test described in *Terry* and *Lidster* applies with particular force when, at the time of the Fourth Amendment's enactment, government officials did not routinely engage in the type of seizure at issue. "[W]here there was no clear practice, either approving or disapproving the type of search at issue at the time [the Fourth Amendment] was enacted, whether [the] particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia*, 515 at 652-53 (internal quotation marks and citations omitted).

As relevant here, in-school interviews of children by child–protective caseworkers and police officers to investigate child abuse did not occur at the time the Fourth Amendment was enacted. In the late 1700s, states had neither compulsory education nor governmental child-protection organizations. Compulsory education did not exist until the late 1800s. *Vernonia*, 515 U.S. at 653 n.1. Similarly, no system—formal or otherwise—for child protection existed at the time of the Fourth Amendment's enactment. John E.B. Myers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449, 449-51 (2008). Not until 1866 did Massachusetts pass the first law authorizing in-

tervention in the family when a child was being harmed "'by reason of orphanage or of the neglect, crime, drunkenness or other vice of parents.'" *Id.* at 450 (quoting An Act Concerning the Care and Education of Neglected Children, 1866 Mass. Acts ch. 283). Organized child-protection agencies emerged shortly afterwards, in the 1870s, but those agencies were operated exclusively by nongovernmental agencies. *Id.* at 451-52. By 1922, 300 nongovernmental organizations existed, but many cities and rural areas still had little to no access to those child-protective services. *Id.* at 452. Not until after the Great Depression did governmental child-protection agencies widely exist. *Id.* In short, no practice existed—either approving or disapproving—the detention of children to investigate claims of child sexual abuse at the time of the Fourth Amendment's enactment. In fact, no organized practice of protecting children existed at all until the 1900s.

Thus, the context of the seizure at issue here must take into account not only the fact that the seizure was of a victim of, and perhaps sole witness to, a crime, but also the fact that no practice approving or disapproving seizures of this sort existed at the time of the Fourth Amendment's framing. Accordingly, this Court must employ the balancing test described in *Terry* and *Lidster* to assess the reasonableness of the in-school interview of the child to determine whether her father had sexually abused her. *Vernonia*, 515 U.S. at 652-53. That balancing test must take into account the government's interest in protecting children against abuse and the child's privacy rights while at school. As explained in more detail be-

low, that balancing tips heavily in favor of permitting government officials, without having first obtained a warrant, to interview a child at her school to determine if her father had sexually abused her.

B. Considering the government's substantial interest in preventing child sexual abuse and the child's reduced liberty interest while in school, a seizure of a suspected child-abuse victim at her school is reasonable at its inception.

1. The State has an extraordinary interest in investigating sexual abuse reports, preventing further harm to the victims, and conducting the investigations in a manner that is least traumatic for the victims.

The government has a compelling interest in preventing child abuse. Child abuse is, without a doubt, a national epidemic. The most recent study on child abuse shows that between 750,000 and 900,000 children are the victims of various forms of child abuse or neglect every year. U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Child Maltreatment 2008*, at 23 (2010), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/index.htm#can; Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 Miss. C. L. Rev. 73, 73 (2005). Yet other studies suggest that as many as one in four girls, and one in seven boys, will experience some form of sexual abuse. Dixon, *Best Practices*, *supra*, at 74; *see generally* Shanta R. Dube, *Long-Term*

Consequences of Childhood Sexual Abuse by Gender of Victim, 28 Am. J. Prev. Med. 430 (2005) (providing general statistics on prevalence of abuse, broken down by gender). A parent is the abuser in over 80% of child-abuse cases. *Child Maltreatment 2008* at 28. The ramifications of child abuse present a heavy burden on our society: child-abuse victims are more likely to develop addictions to drugs and alcohol, commit violent crimes as adults, suffer psychological disorders, experience teen pregnancy, and to abuse their own children. Dixon, *Best Practices*, *supra*, at 75-78. The estimated annual cost of child abuse and neglect to the country is $104 billion a year. Ching-Tung Wang and John Holton, Prevent Child Abuse America, *Total Estimated Cost of Child Abuse and Neglect in the United States* 5 (2007), *available at* http://member.preventchildabuse.org/site/DocServer/cost_analysis.pdf?docID=144; *see also* Child Abuse Prevention and Treatment Act (CAPTA), *as amended by* The Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, Title I, § 101, 117 Stat. 800, 801-02, 42 U.S.C. § 5101 ("the failure to coordinate and comprehensively prevent and treat child abuse and neglect threatens the future of thousands of children and results in a cost to the Nation of billions of dollars in tangible expenditures, as well as significant intangible costs").

Unsurprisingly, then, this Court has recognized that preventing and uncovering child abuse is a compelling government interest. In fact, protecting children is one of society's most important roles. *Wyman v. James*, 400 U.S. 309, 318 (1971) ("There is no more worthy object of the public's concern [than that of car-

ing for the young[.]"). As *parens patriae*, the State has an "urgent interest" in the welfare of all children. *Lassiter v. Dep't of Soc. Services*, 452 U.S. 18, 27 (1981). The State is thus charged with protecting children, who are not yet able to protect themselves, from suffering the trauma of child abuse. And that charge is codified in both federal and state policies. For instance, CAPTA contains Congressional findings about the severity of the child-abuse epidemic and the risks that failing to address the problem creates. It provides that "substantial reductions in the prevalence and incidence of child abuse and neglect and the alleviation of its consequences are matters of the highest national priority[.]" Pub. L. No. 108-36, Title I, § 101, 117 Stat. 800, 801-02, 42 U.S.C. § 5101. The government's interest in preventing and investigating child abuse also is reflected in state policies addressing child protection. *See, e.g.*, Or. Rev. Stat. § 419B.007 (2009) ("for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life . . ., it is necessary and in the public interest to require mandatory reports and investigations of abuse of children"); N.C. Gen. Stat. Ann. § 7B-1400 (2010) ("[I]t is the public policy of this State to prevent the abuse, neglect, and death of juveniles. The General Assembly further finds that the prevention of the abuse, neglect, and death of juveniles is a community responsibility[.]").

And the government's interest in preventing child abuse must be considered in the context in which child abuse occurs. The Ninth Circuit, relying on Oregon law that permits caseworks to obtain a court or-

der to conduct an in-school interview based on probable cause that a child has been abused, concluded that caseworkers must avail themselves of that process (a process akin to obtaining a warrant). *Greene*, 588 F.3d at 1030. But child abuse, and particularly child sexual abuse, is a crime that takes place behind closed doors. The opportunity to develop proof independent of the victim is thus remote, and investigative interviews of suspected child-abuse victims almost always occur before government officials have "probable cause" to believe the abuse has occurred. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."). In addition to its interest in protecting children against abuse and neglect, the government has a substantial interest in being able to interview a child suspected of being a victim of child abuse, without delay, and thus before there is enough information to obtain a warrant. *See Von Raab*, 489 U.S. at 668 (where having to obtain a warrant would only frustrate the government from being able to uncover a "latent or hidden condition" that poses a health or safety threat, a warrantless seizure can be reasonable"). Framed another way, the alternatives to government officials being able to conduct an in-school interview are often fraught with potential peril for child victims or are impractical. Seeking parental consent is simply not a safe or viable option when the suspected abuser is a parent. Obtaining a warrant based on speculation and hearsay—without interviewing the child—may be impossible or inadvisable because development of probable cause

often depends upon the victim who may be the sole witness to the suspected crime.

Equally compelling as the government's interest in protecting children from sexual abuse is the government's interest in conducting child-abuse investigations in a manner that is safest for the child victim. In many cases, the "best practice" for interviewing suspected child-abuse victims includes a single joint interview with law enforcement and child–protective caseworkers present. *See* Dixon, *Best Practices*, *supra*, at 82 ("Within a very short time, the child could be questioned about a very traumatic incident by eight different professionals. For a child who is injured and also traumatized, this is an additional system-induced trauma."). Congress codified this preference for multi-disciplinary teams in CAPTA by recognizing the need for improved child-abuse prevention efforts by "creating and improving the use of multidisciplinary teams and interagency protocols to enhance investigations[.]" 42 U.S.C. § 5106a(a)(2)(A). Most states thus either require or permit multidisciplinary investigations.[4] Reducing the number of interviews

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[4] *See, e.g.*, Or. Rev. Stat. § 419B.020(2)(a) (2009) ("The department [of Human Services] and the law enforcement agency shall jointly determine the roles and responsibilities of the department and the agency in their respective investigations[.]"); N.Y. Exec. Law § 642-a(1) (McKinney 2009) (criminal agencies shall use multi-disciplinary teams to investigate and prosecute child-abuse cases, in part to "minimize the number of times the child is called upon to recite the events"); Conn. Gen. Stat. Ann. § 17a-

not only minimizes the amount of trauma to the child, but also lowers the risk that the child's statements will be contaminated by multiple interviews. Dixon, *Best Practices*, *supra*, at 83 ("Ultimately, children who are interviewed multiple times may begin to recant, if only to stop the frightening, overwhelming process of the investigation. By coordinating the multi-agency response to child abuse, and by designating a forensic interviewer, children are spared additional stress and better information is obtained, inevitably leading to better decision-making."). And that, in turn, reduces the chance that an individual who stands accused of child abuse will be wrongfully convicted based on contaminated statements. *See* Lindsey E. Cronch et al., *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 Aggression and Violent Behavior 195, 196 (2006) (poorly conducted interviews can lead to eliciting false allegations, contaminating facts and increased stress on the child).

That the Ninth Circuit found fault with the fact that a law-enforcement officer joined the caseworker in interviewing the child ignores these practical considerations and encourages the fractured system that CAPTA sought to avoid. *Greene*, 588 F.3d at 1027. The very presence of the law-enforcement officer, with the caseworker, was particularly designed to protect both the child and the accused. The government's interest in conducting a multi-disciplinary,

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101h (2010) (investigatory activities to be coordinated "in order to minimize the number of interviews of any child").

joint interview that protects the victim, the accused, and the legal process does not detract from the reasonableness of the interview, as the Ninth Circuit held, but instead reinforces its reasonableness.

In short, then, this Court should conclude that the government has an extraordinary interest in investigating allegations of and protecting children from sexual abuse, and in doing so in a manner that both reduces the trauma to the victim and protects against contaminated statements that could lead to improper convictions.

2. Balanced against the government's extraordinary interest in protecting children against child abuse is the lesser expectation of privacy that children in schools have.

This Court has recognized repeatedly that the public school context is unique. Students are subject to a "degree of supervision and control that could not be exercised over free adults," and they "'have a lesser expectation of privacy than members of the population generally.'" *Vernonia*, 515 U.S. at 655, 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). "A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety." *Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 830 (2002). For those reasons, students' "'Fourth Amendment rights . . . are different in public schools than elsewhere[.]'" *Earls*, 536 U.S. at 829-30 (quoting *Vernonia*, 515 U.S. at 656). Thus, while children at public school have some expectation

of privacy, it is less than that of an adult in his or her home or walking down the street. The reasonableness of seizures taking place at public schools must therefore be judged in light of this reduced expectation of privacy.

This Court previously has been called upon only to consider schoolchildren's reduced expectation of privacy vis-à-vis seizures committed by school officials. But the reduced expectation of privacy that schoolchildren have is unaltered by the fact that in some cases—as here—caseworkers and law-enforcement officers are the ones interviewing schoolchildren. During the course of the school day, schoolchildren are subject to the control of the State. *See Vernonia*, 515 U.S. at 665 (government acts as "a guardian and tutor of children entrusted to its care"). As a result, they are generally not at liberty to leave the school building when they wish. Whether it is a teacher or a child-protective caseworker from the community, children in public schools simply are not free to do as they choose when they choose and where they choose. *See Vernonia*, 515 U.S. at 654 ("[U]nemancipated minors lack some of the most fundamental rights of self-determination—including even . . . the right to come and go at will.").

For example, schoolchildren are subject to any number of non-school officials talking with them during school hours: community members frequently come in to give guest lectures and provide specialized services. The city's mayor may ask to visit schools to talk with students about local government processes. Law-enforcement officers, as part of a community-

policing effort, may conduct outreach at local schools to talk about safety-related issues. An outside medical professional may come in to test individual student's hearing. Yet in each of those scenarios, the schoolchildren are not free to leave these presentations notwithstanding the fact that the individual talking to them is not a school official. And in none of those scenarios are the schoolchildren unconstitutionally seized.

Moreover, all fifty states and the District of Columbia have statutory schemes dealing with the prevention and investigation of child abuse of schoolchildren, statutes that further inform the legitimacy of any expectation of privacy that schoolchildren may have. *See Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (The Fourth Amendment protects only those privacy expectations that are "legitimate."); *Von Raab*, 489 U.S. at 671 ("operational realities" may diminish privacy expectations, and courts may take into account this diminution when assessing reasonableness). Every state has mandatory reporting laws requiring certain individuals to report instances of suspected child abuse. Forty-six states specifically require school teachers to report to law enforcement or to child–protective agencies any suspected child abuse.[5] Many states also either require or permit child abuse investigations to take place at the child's school. For instance, Oregon law permits child–abuse

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[5] The remaining states simply require every individual who suspects child abuse to report it to the appropriate authorities.

investigations to take place on school premises, so long as the law enforcement officer or child–protective caseworker first notifies the school administrator. Or. Rev. Stat. § 419B.045 (2009). Kansas law provides that "[t]he secretary and law enforcement agencies *shall have access to a child* in a setting designated by school personnel on the premises of an educational institution." Kan. Stat. Ann. § 38-2226(g)(1) (2010) (emphasis added). Michigan requires that "[a] school or other institution shall cooperate with the department during an investigation of a report of child abuse or neglect. Cooperation includes allowing access to the child without parental consent if access is determined by the department to be necessary to complete the investigation or to prevent abuse or neglect of the child." Mich. Comp. Laws Ann. § 722.628(8) (West 2010).

Those statutes further demonstrate that the expectation of privacy of children in school is less than that of adults. Children attending school do so with laws in place that (1) require school personnel to report any suspicions of abuse and (2) permit those investigating such allegations to come to the schools to meet with the child victim. Parents and children thus know that teachers and counselors are responsible for monitoring schoolchildren's health and safety, that if indications of abuse are present, they will be reported, and that in some cases, those charged with investigating reports of child abuse will come to the school to interview the child.

In stark contrast to a child's reduced right of privacy in school stands the government's extraordinary

interest in protecting children against abuse and doing so in ways that minimize trauma for the victim, while at the same time maintaining the integrity of the investigatory process. Stated another way, the government interests in investigating allegations of suspected child abuse are so substantial and compelling that, when compared to a child's limited privacy interest while in school, a warrantless seizure satisfies the Fourth Amendment reasonableness mandate. This Court should thus conclude that seizures to investigate an allegation of child abuse by talking with the child at her school are constitutional at their inception.

3. The Ninth Circuit refused to consider—as the Fourth Amendment requires—the "reasonableness" of the seizure, instead focusing on the government's failure to satisfy the "special-needs" rule.

Rather than considering the seizure at issue in light of the foregoing principles, however, the Ninth Circuit determined that because the government officials had not obtained a warrant or demonstrated that the seizure was justified under the "special-needs" rule, the seizure was unconstitutional. In one sense, the Ninth Circuit is correct that special needs can, in certain circumstances, justify a warrantless seizure. Scholars routinely point to Justice Blackmun's concurrence in *T.L.O.* as the genesis for the special-needs exception to the warrant requirement. *See, e.g.*, Derek Regensburger, *DNA Databases and the Fourth Amendment: The Time Has Come to Reexamine the Special Needs Exception to the Warrant Re-*

quirement and the Primary Purpose Test, 19 Alb. L.J. Sci. & Tech. 319, 349-54 (2009) (explaining history of special needs doctrine). Citing to the balancing test employed in both *Terry* and *Camara*, this Court in *T.L.O.* balanced the students' individual privacy rights against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." *T.L.O.*, 469 U.S. at 339-40. From that balancing, this Court reasoned that the "warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340. And because of the competing interests and the fact that the warrant requirement would likely "'frustrate the governmental purpose behind the search,'" this Court concluded that school officials need not obtain a warrant before searching a student. *Id.* (quoting *Camara*, 387 U.S. at 532-33).

Seeking to limit the instances in which the Court resorted to this balancing of interests, Justice Blackmun in *T.L.O.* articulated what has become known as the "special needs doctrine": "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). In applying that exception, however, this Court has focused less on the nature of the "special need" and more on whether there

is a "law enforcement" purpose to the "special need" at issue. *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding search unconstitutional because of overarching law-enforcement purpose); *Vernonia*, 515 U.S. at 652-65 (focusing on non-law-enforcement character of intrusion and holding search constitutional); *see also* Regensburger, *DNA Databases and the Fourth Amendment*, *supra*, at 350-53; Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of A Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 467 n.162 (2005) (noting this Court's application of special-needs doctrine to a wide range of activities, many of which have characterized the governmental interest at issue as simply being "important" or "substantial," and citing *New York v. Burger*, 482 U.S. 691 (1987), and *Chandler v. Miller*, 520 U.S. 305 (1997)).

Accordingly, whether there is a law-enforcement purpose to the "special need" at issue has become the hallmark of the special-needs doctrine and largely dictates whether this Court will hold constitutional a particular search or seizure. *See, e.g.*, *Ferguson*, 532 U.S. 67 (holding search unconstitutional because of overarching law-enforcement purpose); *Vernonia*, 515 U.S. at 652-53, 658 (focusing on non-law-enforcement character of intrusion); *Skinner*, 489 U.S. at 619, 621 n.5 (same). The Ninth Circuit determined that, because a law-enforcement officer was involved in the interview at issue here, and because of the potential for criminal charges against a third party, the special-needs exception did not apply.

But in narrowly focusing on the special-needs doctrine, what the Ninth Circuit overlooked is that searches or seizures justified by special needs are but one type of warrantless seizure in which the reasonableness of the seizure is assessed by balancing the various interests involved. The special-needs rule in no way encompasses or delineates the entire world of constitutional warrantless seizures. Indeed, the majority of the "special-needs" cases involve programmatic searches or seizures that are entirely suspicionless but that typically generate self-incriminating evidence. *E.g.*, *Earls*, 536 U.S. 822, *Ferguson*, 532 U.S. 67. The extent to which a law-enforcement component may transform what is otherwise a "special need"—or strictly non-law-enforcement purpose—into something more akin to a criminal investigation is thus carefully limited. *E.g.*, *Ferguson*, 532 U.S. at 82-84.

However, where the potential for self-incrimination is minimal or unlikely—as it is here, where state officials are interviewing a potential child victim of a crime—a seizure's "entanglement with law enforcement" is an irrelevant inquiry. *See, e.g.*, *Lidster*, 540 U.S. at 424-25 ("Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual."); *Burger*, 482 US at 713-16 (upholding constitutionality of regulatory search scheme notwithstanding the fact that, "in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself"). The seizure simply is not effected in order to obtain self-

incriminating evidence. Accordingly, any law-enforcement involvement cannot automatically render the seizure unconstitutional. This Court should thus reject the Ninth Circuit's narrow focus on the special-needs doctrine, and instead apply the reasonableness test that the Fourth Amendment mandates.

C. The Ninth Circuit correctly concluded that the scope of the seizure was not so clearly unreasonable as to preclude qualified immunity and that holding is not before this Court.

Having established that seizures of this sort are reasonable at their inception, this Court would traditionally turn its focus to whether the interview conducted here was also reasonable in its scope. *Terry*, 392 U.S. at 20, 28 (because the Fourth Amendment "proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation[,]" balancing involves a dual reasonableness inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."). But because the Ninth Circuit concluded that the interview was unconstitutional in the absence of a warrant, it did not address whether the seizure was reasonable in its scope, concluding only that the scope of the seizure was not so unreasonable as to preclude qualified immunity. And because the Ninth Circuit did not address the reasonableness of the scope of the interview, this Court also need not address the reasonableness of the scope of the interview.

In contrast to the relatively straightforward question concerning the constitutional standard required to justify the initial in-school seizure of a suspected child-abuse victim, the reasonableness of the scope of that seizure presents a "'kaleidoscopic set of facts'" that create "'a classic genuine issue of material fact.'" *Greene*, 588 F.3d at 1021-22 (quoting *Mueller v. Auker*, 576 F.3d 979, 994 (9th Cir. 2009)). Stated differently, the constitutionality of the seizure—that is, the reasonableness of the scope of the seizure—ultimately depends on the resolution of heavily disputed facts by the trier of fact. Because Camreta is entitled to qualified immunity, that resolution should not occur in this case.

This Court recently noted that in cases "in which the constitutional question is so fact-bound," the decision will often provide "little guidance for future cases," and, as a result, those cases "often fail to make a meaningful contribution to" the development of constitutional precedent. *Pearson v. Callahan*, __U.S.__, 129 S. Ct. 808, 819 (2009) (citing *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring) (counseling against the *Saucier* two-step protocol where the question is "so fact dependent that the result will be confusion rather than clarity") and *Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts.")). That reasoning applies with equal force to the issue whether the interview of S.G. was reasona-

bly related in scope to the circumstances justifying the interference in the first place.

The Ninth Circuit noted that, assuming Camreta conducted the interview in the manner S.G. testified to in her affidavit, the reasonableness of the scope of the seizure is a close question. *Greene*, 588 F.3d at 1032-33. But, "mindful of the difficult task facing social services caseworkers, who are required to exercise significant discretion in determining whether a child's welfare is in jeopardy," the court concluded that the scope of the seizure was not so clearly unreasonable as to preclude qualified immunity. *Id.* at 1033. That ruling is correct, and Greene does not challenge it before this Court. And because Camreta is entitled to qualified immunity, this Court need not address the reasonableness of the scope of the seizure. Suffice it to say that, in determining the reasonableness of the scope of such a seizure, courts necessarily must take into account the unique challenges in interviewing a child about potential sexual abuse and that such interviews may justifiably take longer than interviews in other contexts. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent."). But the precise "limitations which the Fourth Amendment places upon" an in-school interview of a suspected victim of child abuse "will have to be developed in the concrete factual circumstances of individual cases." *Terry*, 392 U.S. at 29. This Court need not define those precise limitations in this case, and should instead leave that task

to future cases in which resolution of the issue defines the outcome of the case.

D. Because the State is bound by the Ninth Circuit's legal ruling in this and all future cases, the Ninth Circuit's judgment in favor of the state on qualified immunity grounds does not preclude this Court from reaching the legal issue presented.

The State recognizes, as it did in its petition for a writ of certiorari, that because the Ninth Circuit ruled that petitioner is entitled to qualified immunity, the State received a favorable judgment. The State also recognized in its petition for a writ of certiorari that, with few exceptions, this Court will not grant certiorari when the petitioner prevailed in the court below. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from the denial of certiorari) ("[O]ur practice reflects a settled refusal to entertain an appeal by a party" who prevailed below) (quotations omitted)). Because this Court granted the petition for a writ of certiorari, it may already have concluded—at least preliminarily—that the finding of qualified immunity does not prevent this Court from having jurisdiction to consider the legal issue. However, and to the extent that this question remains an open one, the State briefly explains why this Court should address the merits of the legal issue, notwithstanding the fact that the state prevailed on qualified immunity grounds.

This Court recently relieved lower courts of the obligation to adhere rigidly to the rule announced in *Saucier v. Katz*, 533 U.S. 194 (2001). Under *Saucier*,

courts first had to decide whether a plaintiff's allegations made out a constitutional violation, and only then were permitted to decide whether the right was nonetheless not "clearly established" and whether qualified immunity thus protected the defendant. *Pearson*, 129 S. Ct. at 815-16 (describing the *Saucier* standard). But in *Pearson*, this Court recognized that adherence to that rule

> may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations. Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested.

Id. at 820; *see also Bunting*, 541 U.S. at 1023-24 (Scalia, J., dissenting) (A "favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination. That constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.") (emphasis in original). This Court then recognized the "unenviable choice" that "prevailing" parties in those circumstances must then comply with the lower court's ruling or defy that ruling and risk

new lawsuits and potential punitive damages. *Pearson*, 129 S. Ct. at 820.

In an attempt to remedy that difficulty, this Court in *Pearson* determined that lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818. This Court nevertheless "continue[d] to recognize that [the *Saucier* protocol] is often beneficial." *Id.*

Under *Pearson*, the Ninth Circuit thus did not have to address the constitutional issue because it ultimately ruled in petitioners' favor on qualified immunity grounds. But the Ninth Circuit nevertheless took care to note this Court's advice that the *Saucier* two-step process often "'promotes the development of constitutional precedent'" and—because it had never ruled on the constitutional question presented in this case—it chose to do so to provide guidance "to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." *Greene*, 588 F.3d. at 1021-22 (quoting *Pearson*, 129 S. Ct. at 818). That decision now stands as precedent that governs how government officials may conduct child-abuse investigations in the nation's largest circuit. The State of Oregon—which appears on Camreta's behalf here[6]—is bound by the Ninth Circuit's

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[6] Oregon law requires public bodies—including the State—to indemnify their officers, employees and agents against tort and other claims arising out of the individual's performance of duty. Or. Rev. Stat. § 30.285 (2009). This

constitutional ruling in future cases. Absent the ability to seek further review in this case, it must either comply with what it believes to be an erroneous decision or continue interviewing potential child-abuse victims and incur significant liability in the process.

So framed, the Ninth Circuit's Fourth Amendment declaration is not "mere dictum" unreviewable by this court. *Bunting*, 541 U.S. at 1023 (Scalia, J., dissenting). The State should thus be entitled to obtain review of that ruling, to avoid being forced to "'defly] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits' and potential 'punitive damages.'" *Pearson*, 129 S. Ct. at 820 (quoting *Horne v. Coughlin*, 191 F.3d 244, 247-48 (2d Cir. 1999)). The Ninth Circuit's qualified immunity ruling thus should not preclude review of its Fourth Amendment holding.

CONCLUSION

In concluding that government officials were required to obtain a warrant before interviewing a child at her public school to determine whether her father was sexually abusing her, the Ninth Circuit misapplied the fundamental Fourth Amendment principle that every seizure be "reasonable." This Court should reverse the Ninth Circuit's holding, and instead apply the balancing test that the Fourth Amendment mandates where the seizure is less intrusive than that involved in a traditional arrest and when its purpose is to prevent or investigate a harm. Using that balanc-

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duty to indemnify extends to claims based on 42 U.S.C. § 1983 (2006). 44 Op. Att'y Gen. 416, 422-27 (Or. 1985).

ing test, this Court also should conclude that the interview of the child at her school to determine whether she was the victim of sexual abuse was reasonable at its inception.

Respectfully submitted,

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